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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Qwest Communications International, Inc.

File: B-287459; B-287459.2

Date: June 25, 2001

Rand L. Allen, Esq., John McCullough, Esq., and Derek Yeo, Esq., Wiley, Rein & Fielding, for the protesters.
David S. Cohen, Esq., and John J. O'Brien, Esq., Cohen Mohr, and George J. Affe, Esq., for Sprint Communications Company, LP, and C. Stanley Dees, Esq., and Alison L. Doyle, Esq., McKenna & Cuneo, for AT&T Communications, Inc., intervenors.
Michelle Harrell, Esq., and Michael J. Ettner, Esq., General Services Administration, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of General Services Administration's sole-source extensions of FTS 2000 bridge contracts is dismissed where, because protester is subject to restrictions under section 271 of the Communications Act of 1934, as amended, 47 U.S.C. § 271, there is no basis for concluding that protester would be able to meet requirement for ubiquitous, nationwide long-distance service even had agency competed the requirement; accordingly, protester is not interested party for purpose of challenging sole-source awards.

DECISION

Qwest Communications International, Inc. protests the General Services Administration's (GSA) sole-source extensions of the agency's FTS 2000 bridge contracts with AT&T Communications, Inc. (GS-00T-99NSD-0003) (AT&T Bridge Contract), and Sprint Communications Company, L.P. (GS-00T-99NSD-0002) (Sprint Bridge Contract), for long-distance telecommunications services. Qwest, which maintains that it can meet the agency's needs, argues that the sole-source extensions were improper.

We dismiss the protest.

In December 1988, GSA awarded separate 10-year contracts to AT&T (No. GS-00K-89AHD-0008) and Sprint (No. GS-00K-89AHD-0009), the original FTS 2000 contracts, for a comprehensive set of long-distance services--including switched voice services, packet switched services, dedicated transmission services, video transmission services, and switched digital integrated services--to be furnished on the basis of ubiquitous service throughout the continental United States, Alaska, Hawaii, and Puerto Rico. The contracts provided for each FTS 2000 contractor to serve as a single point of contact with customer agencies and to furnish multi-level hierarchical billing customized for each agency user. Contracting Officer's Statement (COS) at 1; see, e.g., Agency Report (AR), Sprint FTS 2000 Contract, §§ C.1.1, C.1.3.1, C.2.1.3, C.3.2.4.4.

On December 1, 1998, prior to the award of competitive contracts under the FTS 2001 program, the successor to the FTS 2000 program, GSA awarded sole-source extension of service bridge contracts to AT&T and Sprint for the continuation of FTS 2000 service for up to 2 years (a base year and two 6-month options). COS at 1; AR, Tab 22, AT&T Bridge Contract; AR, Tab 23, Sprint Bridge Contract. Subsequently, GSA made a competitive award of one FTS 2001 contract to Sprint (No. GS-00T-99NRD-2001) on December 18 and, on January 11, 1999, awarded another FTS 2001 contract to MCI Worldcom (No. GS-00T-99NRD-2002). The FTS 2001 contracts continued the requirement to furnish basic FTS 2000 services, added additional service offering requirements, maintained a ubiquitous domestic coverage requirement for such basic services as switched voice service, and extended the geographical coverage of the contracts to international locations. COS at 2; AR, FTS 2001 Solicitation, Statement of Work §§ C.1.2, C.1.3, C.2.1.1.1.1, C.2.1.3; see, e.g., Sprint FTS 2001 Contract at §§ C.2.1.1.1.1, J.8.3.1.

GSA reports that when it awarded the bridge contracts in 1998, it expected that the potential 2-year period of the contracts would afford sufficient time for the agency to award the FTS 2001 contracts and to complete customer agency transitions to FTS 2001 service. COS at 1. GSA further reports that, as late as July 2000, the agency still believed the transition could be completed by the December 6, 2000 expiration of the bridge contracts. Id. at 2. However, on or around August 1, the program office advised the contracting office that some agencies would not complete the transition from FTS 2000 to FTS 2001 by December 6. AR at 9 n.14, 10. Subsequently, on December 5, after negotiating with both contractors, GSA modified AT&T's and Sprint's bridge contracts, extending AT&T's by 1 year and Sprint's by 6 months. AR, AT&T Bridge Contract Modification No. PS39, and Sprint Bridge Contract Modification No. PS21. Although some service offering requirements were eliminated in the extended AT&T contract, the FTS 2000 requirements for nationwide ubiquitous service and a single contractual point of contact for service responsibility were maintained under both extended contracts. Id.; COS at 2-6.

GSA did not synopsize the sole-source extensions prior to extending the bridge contracts, and the justifications and approvals (J&A) for the extensions were not

executed until December 22. However, the J&As indicate that the agency relied on 41 U.S.C. § 253(c)(2) (1994) as authority for the use of other than full and open competition. That section provides that other than competitive procedures may be used where the "agency's need for the property or services is of such unusual and compelling urgency that the Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals." After observing that the remaining sites to be transitioned were "mainly of large complex data systems and remote sites," each J&A explained the sole-source extension on the basis that:

> No other contractor could provide the 'seamless' telecommunications services, including billing and legacy software developed for reporting systems that meet the clients mission critical needs. Issuance and negotiation of a new competitive acquisition is not practical as it would cause significant time delays, cause duplicative costs for the minimally non-transitioned services, and would not offer lower pricing due to the extremely small customer base of non-transitioned service.
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> Because of the constraints imposed by the immediacy of the situation, it is reasonable to conclude that only the incumbent FTS2000 firm is capable of meeting all of the requirements because of its detailed familiarity with the totality of the agencies' requirement. Alternative sources lacking the necessary familiarity were therefore not considered.

AR, J&As for Other than Full and Open Competition, AT&T and Sprint. Upon learning of the extensions, Qwest filed an agency-level protest, arguing that the sole-source awards were unjustified, and that it should have been given an opportunity to compete for the requirement. GSA denied the protest, and Qwest then raised the same arguments in this protest filed with our Office.

It is GSA's position that Qwest could not satisfy the agency's requirement for ubiquitous, nationwide long-distance service in which "the contractor shall coordinate all activities with its subcontractors providing services to or as part of FTS 2000," AR, Sprint FTS 2000 Contract § C.1.3.2, and that Qwest therefore was not a potential competitor and is not in a position to question the propriety of the awards.[1] Specifically, GSA notes that, as a result of Qwest's having merged in

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[1] Although Qwest has suggested that some of the FTS 2000 requirements may no longer be valid, and could change if a competition were held, the protester has acknowledged that "[s]ome requirements, such as nationwide service, would probably remain under a competition." Qwest Comments, Apr. 30, 2001, at 31 n.7.

2000 with U.S. West Communications, Inc., a regional Bell Operating Company (BOC) providing local telephone service in 14 western states, Qwest assumed the status of a BOC subject to restrictions imposed by section 271 of the Communications Act of 1934, as amended. 47 U.S.C. § 271; see 41 U.S.C. § 153(4), (21). Section 271 precludes any BOC, as well as any affiliate of a BOC, from providing long-distance ("interLATA") service originating in the region where it provides local service, unless and until the Federal Communications Commission (FCC) determines that various conditions relating to enabling competition in local telephone service are satisfied. 47 U.S.C. § 271; see 41 U.S.C. § 153(4), (21); AT&T Corp. v. US West Communications, Inc., Nos. E-97-28, E-97-40A, Feb. 14, 2001, at ¶¶ 1, 9. The record in this regard indicates that, at the time of the extension of the bridge contracts, Qwest had not received section 271 approval to provide long-distance service in its 14-state service region. AT&T Corp. v. US West Communications, Inc., supra, at ¶ 1; Protest at 5. GSA concludes that, since its requirement was for ubiquitous, nationwide long-distance service, and Qwest was unable to offer such service in 14 states, Qwest was not in a position to compete for the bridge contract extensions.

Qwest acknowledges the overall section 271 limitation on its furnishing long-distance service in its 14-state service area. According to Qwest, however, it "is not proposing that Qwest itself would provide in-region long-distance service," Qwest Comments, Apr. 17, 2001, at 7; rather, Qwest maintains that it can avoid the section 271 limitation, and still satisfy the agency's needs, by teaming with Intermedia Communications, Inc. Qwest states in this regard that (1) "[u]nder Qwest's proposed teaming arrangement with Intermedia, the two companies would provide ubiquitous, nationwide service--Qwest would provide out-of-region service and Intermedia would provide in-region service"; (2) "Qwest would serve as the initial point of contact for all Government inquiries"; and (3) if "GSA determines, according to [Federal Acquisition Regulation] Part 11 procedures, that its competitive requirements include" use of the current, legacy billing systems, Qwest and Intermedia would "accommodate" this need. Qwest Comments, Apr. 30, 2001, at 33.

We conclude that GSA's position--that Qwest's teaming approach could not satisfy the agency's needs without running afoul of section 271--is reasonable. In this regard, the FCC, in discussing its decision in AT&T v. Ameritech Corp., 13 F.C.C.R. 21,438 (1998), aff'd sub nom. US West Communications, Inc. v. FCC, 177 F.3d 1057 (D.C. Cir. 1999), cert. denied, 528 U.S. 1188 (2000), has stated that it "interpreted section 271's statutory ban on BOC provision of prohibited long-distance in-region interLATA services to bar certain business arrangements even when the BOC did not actually perform the prohibited interLATA transmission." In the Matter Qwest Communications International, Inc. and US West, Inc., 15 F.C.C.R. 11,909 (2000) at ¶ 7. In determining which business arrangements are permissible under section 271, the FCC appears to use a case-by-case approach, under which it

> balances the following non-exclusive factors: 'whether the BOC obtains material benefits (other than access charges) uniquely associated with the ability to include a long-distance component in [the challenged offering], whether the BOC is effectively holding itself out as a provider of long distance service, and whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public.' In evaluating the challenged BOC actions, the Commission considers 'the totality of [the BOC's] involvement, rather than focus[ing] on any one particular activity.'

AT&T Corp. v. US West Communications, Inc., supra, at ¶ 11.[2]

Qwest, applying the above balancing analysis, attempts to establish that its proposed arrangement with Intermedia would not be prohibited under section 271. However, even if in-region interLATA service in the 14 states were directly provided by Intermedia, not Qwest, it is not clear how Qwest, as a prime contractor--responsible for ubiquitous service with a single point of contact for service responsibility--could avoid being viewed by the FCC as the ultimate provider of those services, in contravention of section 271. As quoted above, one of the factors included in the FCC's balancing test is "whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public." At minimum, there appears to be a reasonable possibility that the FCC could view Qwest's role as a prime contractor as including such activities and functions. Certainly, Qwest can point to no applicable regulation or ruling that conclusively establishes its ability to accept responsibility for satisfying the agency's requirement consistent with section 271. Under these circumstances, we find reasonable GSA's position that Qwest was not a viable potential source for the bridge contract services.[3]

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[2] As an example of the FCC's approach, in AT&T v. Ameritech Corp., supra, it found an arrangement impermissible under section 271 where the BOC developed a package of services for its local service customers that included a long distance service component; selected a non-BOC carrier to transmit the long distance service; established and exercised control over the price, terms and conditions under which the long-distance service would be offered; served as the initial and primary point of contact for the customer for all service inquiries; relied on its brand name in marketing the combined offering; and expressly recommended the non-BOC's long distance service. AT&T v. Ameritech Corp., supra, at ¶ 1; see AT&T Corp. v. US West Communications Corp., supra, at ¶ 3.

[3] Although our Office afforded the FCC an opportunity to comment as to whether the approach proposed by Qwest was consistent with the section 271 limitations on BOCs, the FCC declined to furnish a report.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (Supp. IV 1998), only an "interested party" may protest a federal procurement. See Bid Protest Regulations, 4 C.F.R. § 21.0(a) (2001). As we are unable to conclude that Qwest was in a position to satisfy the agency's FTS 2000 bridge contract needs, Qwest is not an interested party to question the extension of AT&T's and Sprint's bridge contracts. Peachtree 25th LLC d/b/a/ American Management. Co., B-281185, B-281185.2, Dec. 4, 1998, 98-2 CPD ¶ 126 at 5 n.5; see 440 East 62nd St. Co., B-276787, July 24, 1997, 97-2 CPD ¶ 30 at 4 n.3.

The protest is dismissed.

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General Counsel